Filed 11/10/09 P. v. Sifuentez CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOHN JOE SIFUENTEZ, Defendant and Appellant.	H032440 (Santa Clara County Super. Ct. No. CC618607)

Following a bench trial, the trial court convicted defendant of attempted lewd or lascivious act on a child under the age of 14 (Pen. Code §§ 664/288, subd. (a), ct. 1), and attempted distribution or exhibition of harmful matter to a minor through the Internet. (Pen. Code §§ 664/288.2, subd. (b), ct. 2.)[1] Imposition of sentence was suspended and defendant was placed on probation for three years.

On appeal, defendant contends that his conviction for the attempted distribution of harmful material must be reversed for insufficient evidence of the intent to seduce. He also argues that his conviction for attempted distribution of harmful matter should be reversed because it violates the federal constitution's dormant Commerce Clause and the

[1] All further statutory references are to the Penal Code unless otherwise indicated.

First Amendment. He does not challenge his conviction for an attempted lewd act. We affirm.

STATEMENT OF FACTS

In December 2005, San Jose Police Officer Adam Tovar was assigned to work in the special unit for investigating Internet crimes against children. He set up an email account of bboyzz@aol.com for his persona, "Adam." Using that email address, he placed an ad on Craigslist in the men-seeking-men section stating that "Adam" was "young, seeking older friend." On December 9, 2005, a person using the email address campbellca@pacbell.net answered the ad. He identified himself as "John, five ten, a hundred thirty-five. Clean. Discrete." He gave a phone number and attached a photograph of a nude male with a semi-erect penis; the head was cut off.

That same day, Officer Tovar ("Adam") responded to John's email. He said that John's "picture was cool" and that he ("Adam") was 13. "Adam" asked if John "was okay with that." "Adam" attached a picture of a young, white, teenage boy posing on a balcony.

The next day, when "Adam" logged on to his computer, he had a message from "John" from the day before. It said, "if this is you and you're thirteen, that's too young for me." But John also said that he wanted "Adam" to call him, and included a phone number.

On December 15, John sent "Adam" an email saying that he was 33. "Adam" replied that "it was good to have someone to talk to and look up to. And [I] hope he did not mind I was thirteen years old. I told him I was not experienced and wanted to learn. And that we could meet at a park after school."

On December 16, John sent an email in which he said "thirteen was cool but young. Let me know when you have time to meet." Earlier that day, John had sent "Adam" an email saying he did not want to talk about sexual subjects on the Internet

because he did not want to be set up. John also sent "Adam" another picture of himself. This one showed his face. In court, Officer Tovar identified defendant as the person in the picture.

"Adam" and defendant continued to correspond during December 2005. On December 27, defendant sent "Adam" an email in which he wished him a belated Merry Christmas and continued: "Hey, had a few cool dreams you popped in. Well, somebody popped up in somebody, or was it everybody popping up in everybody, and taste, tongue searching hi and low for the best hole. Looked like three, you were there, I was there, pretty sure it was us, the other a friend. Well we all appeared to be in our boxers talking and grabbing our hard and hot muscle. Cool room with a few big windows, overlooked the city. At night we could have the lights dim and see the lights of the city, small city, but cool with the lights shimmering off all of us. And no one could see us. The two of us plus one. Few others there, not sure who, G.P. I think. Small get together celebrate the holidays and sexuality to explore. We met up and began the evening with conversations and understanding. We get to know each other, and we indulge in surroundings and company (us). To check out, touch, and feel another body, and explore new areas and get to know all on an intimate level. Utilizing all senses. Rubbing oil on all with massaging – we massage each other from head to toe, tasting, touching, and feeling all along the way. Feels like hours of fun, funs, music, D.V.D.'s running, then all erect, with the biggest, hardest hard-on we all have ever had. We all start to feel each other and look for warm holes to slowly penetrate, first touch, taste, then inside feeling all care not to tear, and no hands, with care, and ease, and continue to go deeper, until every part of your pulsating hard-on is tight and warm, slowly increasing the friction between the two, changing, switching the three. Ok, let's fast forward to a cum scene. All exploding again and again, and each able to feel both holes filled at the same time, all has a turn to ride and eat. More, more, cum all over us, bodies, face, tongue, mouth, all – we all cum together again and again all over each other. [¶] More happened in the dream but had to

skip to one of the cum parts. Call or write. " The email included a phone number and concluded, "Tell me all about your fun and friends. John."

On January 17, 2006, Officer Tovar had a female detective call defendant and pretend to be "Adam" while he monitored the call. During the phone call, defendant was very cautious and wanted to make sure he was talking to the person with whom he had been corresponding online. "He talked about not wanting to be set up." Defendant told "Adam" not to say anything because someone might get in trouble. He also talked about getting naked, oral sex, kissing and anal sex. During this conversation, "Adam" again reminded defendant that he was 13. "Adam" suggested that they meet on Friday at Starbucks.

On January 18, "Adam" received an email in which defendant said that he had really enjoyed talking to him, had gotten "pretty hard" and was looking forward to meeting "Adam" on Friday. On January 19, the female detective made another monitored pretext call. They discussed whether anal sex was going to hurt. Defendant acknowledged that it was going to hurt at first, but agreed to bring lubricant. They confirmed that they would meet at the Starbucks on the Alameda at West Julian in San Jose.

"Adam" and defendant planned to meet at 1:30 p.m. on January 20. Defendant said he would be driving a white Cadillac and wearing a black hat. Officer Tovar's team went to the Starbucks location and set up surveillance. Defendant arrived in a white Cadillac and was wearing the black hat. Tovar identified defendant to the other officers on his team, and defendant was detained by them after he entered the Starbucks. Police found a bottle of Astroglide personal lubricant when they searched defendant's car.

Following his arrest, defendant gave Officer Tovar a *Mirandized*[2] statement. He admitted that he had sent "Adam" the two images of himself. He said that he only intended to meet "Adam" to discuss with him the dangers of going on-line and meeting people like this on the Internet. He also said that he would not have forced "Adam" to engage in any type of sexual conduct, but if "Adam" was interested and wanted to pursue it, they would have kissed, played with each other, or engaged in some type of mutual masturbation or oral sex. Defendant maintained that he was never pursuing "Adam"; "Adam" was pursuing him.

DISCUSSION

Substantial Evidence of Intent to Seduce

Defendant contends that the evidence is insufficient to prove that he "intended to seduce a minor" because, the evidence does not show that, at the time he sent "Adam" the email describing a sexual fantasy on December 27, 2005, he intended to entice "Adam" into engaging in a sexual act involving physical contact with him, or even intended to meet "Adam" in person. He argues that he "made no effort to 'persuade' or 'entice' 'Adam' into having sexual intercourse with him." The belated Christmas greeting contained "nothing more than a shared 'fantasy,' " and defendant's invitation to have "Adam" call or write defendant about "his friends and what he did during the Christmas holiday" was "not of a sexual nature." Defendant did not ask "Adam" to meet in person; "Adam" asked defendant to do so. Defendant "had already told 'Adam' that thirteen was 'too young' for him." He never tried to persuade "Adam" to engage in anal intercourse. Although he admitted to Officer Tovar that he might have engaged in sexual activity with "Adam," he would not have "forced" "Adam" to do anything. "In this 'relationship,'

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

Sifuentez is the follower rather than the seducer." For the reasons we explain below, we reject defendant's contention.

Section 288.2, subdivision (b) provides: "Every person who, with knowledge that a person is a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by electronic mail, the Internet, as defined in Section 17538 of the Business and Professions Code, or a commercial online service, any harmful matter, as defined in Section 313, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent, or for the purpose of seducing a minor, is guilty of a public offense and shall be punished by imprisonment in the state prison or in a county jail." This Court has held that "as used in . . . section 288.2, subdivision (b), the word 'seducing' was not intended to have the vague meaning of 'lead[ing] astray' (Webster's Collegiate Dict. (10th ed.1999) p. 1057) but to have the precise meaning of 'carry[ing] out the physical seduction of: entic[ing] to sexual intercourse.' (Webster's Collegiate Dict. (10th ed.1999) p. 1057.) And, in this context, 'sexual intercourse' clearly refers to 'intercourse involving genital contact between individuals' rather than 'heterosexual intercourse involving penetration of the vagina by the penis.' (Webster's Collegiate Dict. (10th ed.1999) p. 1074.) Thus, the 'seducing' intent element of the offense requires that the perpetrator intend to entice the minor to engage in a sexual act involving physical contact between the perpetrator and the minor. Intending to entice a male minor to masturbate himself does not satisfy this 'seducing' intent element of . . . section 288.2, subdivision (b)." (*People v. Jensen* (2003) 114 Cal.App.4th 224, 239-240, following *People v. Hsu* (2000) 82 Cal.App.4th 976, 992 (*Hsu*).)

In reviewing a claim of insufficiency of the evidence on appeal, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting

Jackson v. Virginia (1979) 443 U.S. 307, 318-319.) "An appellate court must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425; accord, *People v. Pensinger* (1991) 52 Cal.3d 1210, 1237.) "The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence. . . . An appellate court must accept logical inferences that the [trier of fact] might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

In this case, the trier of fact was entitled to infer from the content of the elaborate dream sequence recounted by defendant in his post-Christmas email that his purpose in sending it was to persuade "Adam" to engage in genital contact with him. He painted a romantic picture of friends sharing "conversations and understanding" before engaging in gentle acts of sexual foreplay in "cool room" with a view of "shimmering" city lights. The references to the slow penetration of "holes," and in particular the reference to the "inside feeling all care not to tear . . . and continue to go deeper," makes clear that defendant was not merely trying to entice "Adam" into self-masturbation; the reverie was intended to disarm a young boy's anticipated resistance to painful genital contact. The trier of fact was also entitled to infer that defendant hoped to continue the seduction to fruition. Defendant urged "Adam" to call or write him, again included his phone number, and encouraged "Adam" to share his own stories of "fun and friends." Later conversations also included discussion of anal sex. A meeting was arranged. Defendant arrived with lubricant. Substantial evidence supports a finding that defendant had the intent to seduce "Adam" when he sent the December 27 email.

Dormant Commerce Clause

Relying on the dissenting opinion of Justice McDonald in *People v. Hatch* (2000) 80 Cal.App.4th 170, at pages 205 to 227 (*Hatch*), defendant argues that section 288.2 is unconstitutional on its face "because its attempt at localized regulation of the Internet has

a chilling effect on interstate commerce." Defendant's argument has already been rejected by this court. (*People v. Garelick* (2008) 161 Cal.App.4th 1107.) We respectfully disagree with the views expressed by Justice McDonald in his dissent and elect to follow the reasoning of the majority opinions in *Hatch*, and *Hsu*, *supra*, 82 Cal.App.4th 976. Nothing in defendant's briefs persuades us to change our view.

Article One of the United States Constitution grants Congress the power to regulate commerce among the several states. (U.S. Const., art. I, § 8, cl. 3.) When a state imposes a regulation that unduly burdens interstate commerce and impedes free trade, it may violate the dormant commerce clause. (*Hsu, supra*, 82 Cal.App.4th at p. 983.)

In *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, the United States Supreme Court set out the test for determining whether a state statute violates the commerce clause. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [Citation.] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." (*Id.* at p. 142.)

Justice McDonald's dissent, and defendant's argument here, both rely in large part on *American Libraries Ass'n v. Pataki* (S.D.N.Y. 1997) 969 F.Supp. 160 (*Pataki*). The argument is that section 288.2 violates the commerce clause by subjecting the Internet to inconsistent state regulation. As we will explain, we find *Pataki* distinguishable.

At issue in *Pataki* was a New York statute that criminalized knowingly communicating harmful matter to minors over the Internet.[3] The court found that the

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[3] New York Penal Law section 235.21 made it a crime for an individual "[k]nowing the character and content of the communication which, in whole or in

statute applied to interstate communication because the statute did not limit its application to communications that took place entirely within the state. (*Pataki*, *supra*, 969 F.Supp. at pp. 169-172.) In addition, New York law had the effect of exporting New York policy to other states because the nature of the Internet makes it impossible to restrict the effects of the law to conduct occurring within New York. (*Id.* at p. 177.)

Furthermore, the court found the burden on interstate commerce exceeded any local benefit of the law. (*Pataki*, *supra*, 969 F.Supp. at pp. 177-181.) Finally, the court concluded the nature of the Internet "requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations" regarding the kind of material that may be disseminated through the medium. (*Id.* at p. 182.) Thus, the court found the New York law violated the commerce clause. (*Id.* at p. 183.)

However, the *Hatch* and *Hsu* courts considered the specific question whether section 288.2 (prohibiting the transmission of harmful material for the purposes of seducing a minor) is violative of the commerce clause. The defendants in both *Hatch* and *Hsu* argued that the reasoning in *Pataki* applied to invalidate section 288.2. The *Hatch* and *Hsu* courts rejected the *Pataki* analysis, noting that section 288.2, unlike the statute at issue in *Pataki*, requires an offender to communicate harmful matter to a known minor with the intent to seduce the minor. (*Hatch*, *supra*, 80 Cal.App.4th at pp. 194-195; *Hsu*, *supra*, 82 Cal.App.4th at pp. 984-985.) Both courts concluded that the intent element serves the critical function of greatly narrowing the scope of the statute and its effect on interstate commerce. (*Hatch*, at pp. 195-196; *Hsu*, at p. 984.) The *Hatch* court concluded: "While a ban on the simple *communication* of certain materials may interfere

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part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, [to] intentionally use . . . any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor." (*Pataki*, *supra*, 969 F.Supp. at p. 163.)

with an adult's legitimate rights, a ban on communication of specified matter to a minor *for purposes of seduction* can only affect the rights of the very narrow class of adults who intend to engage in sex with minors. We have found no case which gives such intentions or the communications employed in realizing them protection under the dormant commerce clause." (*Hatch*, *supra*, 80 Cal.App.4th at p. 195.)

Hsu also rejected the contention that section 288.2 improperly regulates "behavior occurring wholly outside California." (*Hsu*, *supra*, 82 Cal.App.4th at p. 985.) California law generally bars punishment for wholly extraterritorial offenses. California prosecutes only those criminal acts that occur wholly or partially within the state. (§§ 27, 777, 778, 778a, 778b.) "Statutes 'must be construed in the light of the general principle that, ordinarily, a state does not impose punishment for acts done outside its territory.' " (*Hsu*, at p. 985.) "Section 288.2, subdivision (b) makes no reference to place of performance, so courts must assume the Legislature did not intend to regulate conduct taking place outside the state." (*Ibid*.) Thus, section 288.2 cannot be enforced beyond that which is jurisdictionally allowed. Such enforcement would not burden interstate commerce.

We find the reasoning of *Hatch* and *Hsu* persuasive and adopt it here. Since we agree with those courts that section 288.2 does not subject the Internet to piecemeal legislation or regulate conduct outside California, we find no substantial burden on legitimate interstate commerce activity and therefore conclude, as did the *Hsu* majority, that any incidental burden on interstate commerce is far outweighed by the state's compelling interest in protecting minors. (*Hsu*, *supra*, 82 Cal.App.4th at p. 984.) Accordingly, we reject defendant's commerce clause challenge.

First Amendment

Again relying on the dissenting opinion in *Hatch*, defendant argues that section 288.2, subdivision (b) violates the First Amendment because it "affects persons who are under 18 years of age, yet live in states with lower ages of consent than in California and who are thus legally entitled to receive such communications." He also argues that

section 288.2, subdivision (b) is facially invalid because it "makes unlawful a substantial amount of constitutionally protected speech." These contentions were rejected in *Hatch* and *Hsu*.

The *Hatch* court found that section 288.2 did not violate the First Amendment because "[t]he activity prohibited by the California statute is far more akin to conduct than communication." (*Hatch*, *supra*, 80 Cal.App.4th at p. 202.) "Section 288.2 is not directed at speech, but at the activity of attempting to seduce a minor. . . . Thus, the only chilling effect of section 288.2 is on pedophiles who intend that their statements will be acted upon by children. Given the intention with which they are made, such statements are not entitled to the extraordinary protection of the First Amendment." (*Id.* at p. 203.)

In contrast, the *Hsu* court concluded that section 288.2, did prohibit speech based upon its content, but that the statute served a compelling state interest in a narrowly drawn manner. (*Hsu*, *supra*, 82 Cal.App.4th at p. 986.)

However, we need not choose between the dueling rationales of *Hatch* and *Hsu* on the question whether section 288.2 sanctions speech or conduct because, in either case, we are convinced that the statute does serve a compelling state interest in protecting minors from seduction by adults via the Internet, and does so in a way that is narrowly tailored to achieve this end. "Before it can be violated, the sender must know the recipient is a minor, know the transmitted matter is harmful, intend to arouse the minor's sexual desires, and, most specifically, intend to seduce the minor. The only chilling effect of the statute is on the conduct of those who would use otherwise protected speech to seduce minors. There is no violation of section 288.2, subdivision (b) when an adult disseminates the matter to another adult or to a minor without the intent of seducing the minor recipient. [¶] Moreover, the statute's built-in affirmative defenses further limit its reach so that it targets only those who prey on minors to seduce them. It provides that parents or guardians who transmit the statutorily defined 'harmful material' to aid legitimate sex education, or other adults who transmit the material to aid scientific or

educational purposes, shall have a defense against prosecution, and it relieves the Internet providers who transmit the material from prosecution entirely. (§ 288.2, subds. (c), (d), (e).) [¶] These limitations on section 288.2, subdivision (b) distinguish it from the statutes found unconstitutionally overbroad." (*Hsu*, *supra*, 82 Cal.App.4th at p. 989.) Thus, we decline defendant's invitation to adopt Justice McDonald's dissent in *Hatch.* Defendant's conviction in this case is not barred by the First Amendment.

CONCLUSION

Substantial evidence supports a finding of intent to seduce. Defendant's conviction for violating section 288.2, subdivision (b), does not violate the Commerce Clause or the First Amendment.

DISPOSITION

The judgment is affirmed.

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McAdams, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Mihara, J.